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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 ROBERT NEFF,

10 Plaintiff,

11 v.

12 ZEWDNEH N. DESTA, et al.,

13 Defendants.  
14

Case No. 18-CV-1716-RSL

ORDER DENYING  
DEFENDANTS' MOTION  
FOR LEAVE TO AMEND  
ANSWER

15 This matter comes before the Court on defendants' "Motion for Leave to Amend  
16 Answer." Dkt. #25. For the reasons described below, defendants' motion is DENIED.

17 **I. BACKGROUND**

18 This case arises out of a motor vehicle-pedestrian collision in Auburn, Washington in the  
19 early morning of December 22, 2015. See Dkt. #1-2 (Compl.). Defendant Zewdneh Desta  
20 entered a Safeway distribution center in a loaded tractor trailer, and parked and exited his  
21 vehicle to check in at a guard shack. Id. at ¶ 5.18. Desta alleges that he was asked by either a  
22 Safeway employee or a Securitas<sup>1</sup> employee to move his truck to a different area of the parking  
23 lot. See Dkt. #35 (Ex. A) at 13. As Desta moved his truck, he struck and ran over plaintiff,  
24 injuring him. See Dkt. #1-2 at ¶ 5.19-5.23.

25 Plaintiff brought this action against Desta, his employer K&B Transportation, and  
26 Safeway. Id. In their answer, defendants included potential non-party fault as an affirmative  
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28 <sup>1</sup> Defendants' motion identifies both Securitas Security Services, Inc. and Securitas Security  
Services USA. See Dkt. #25. For clarity, this motion collectively references "Securitas."

1 defense.<sup>2</sup> Plaintiff later sought to dismiss Safeway as a party after determining “there was no  
2 viable avenue of liability against [it].” Dkt. #34 at 6. All parties stipulated to dismissing  
3 Safeway without prejudice, which would convert into a dismissal with prejudice unless any  
4 party moved to amend its pleadings to assert fault against Safeway before September 4, 2019.  
5 See Dkt. #22.

6 On September 3, 2019, defendants filed the instant motion, seeking to amend their  
7 answer to incorporate an affirmative defense to apportion non-party fault to Safeway and  
8 Securitas. See Dkt. #25. Plaintiff and Safeway oppose the motion. See Dkt. #32; Dkt. #34.  
9 Plaintiff also filed two sur-replies, requesting that the Court (1) strike defendants’ reply brief as  
10 untimely (Dkt. #39) and (2) strike the declaration of Clifford McQuarrie, filed alongside  
11 defendants’ reply brief (Dkt. #51).

## 12 **II. PLAINTIFF’S REQUESTS TO STRIKE**

13 As an initial matter, the Court addresses plaintiffs’ two sur-replies, which request that the  
14 Court strike components of defendants’ motion to amend briefing. See Dkt. #39; Dkt. #51.

15 Pursuant to Local Civil Rule 7(d)(3), defendants’ motion for leave to amend (Dkt. #25)  
16 was properly noted for consideration on Friday, September 20, 2019. See id.; LCR 7(d)(3).  
17 Defendants did not file their reply brief and supporting declaration until Monday, September 23,  
18 2019, three days after the filing deadline. See Dkt. #37; Dkt. #38. Defendants did not seek  
19 permission or offer any explanation for their late reply. Accordingly, plaintiff requests that the  
20 Court strike defendants’ reply and supporting declaration. See Dkt. #39. The Court declines to  
21 strike the untimely reply or declaration on this basis given its preference for deciding issues on  
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27 <sup>2</sup> *See* Dkt. #14 at 6 (“The parties and non-parties identified through discovery were at fault for  
28 the subject incident. Defendants will ask the jury to apportion fault based on the evidence learned  
through discovery. Defendants will ask the Court to offset any award in [p]laintiff’s favor by his share  
of fault.”).

1 the merits with the benefit of full information.<sup>3</sup> However, defendants are cautioned that any  
2 additional untimely filings may be stricken.

3 Plaintiff also asks the Court to strike the declaration of Clifford McQuarrie (Dkt. #38) on  
4 the basis that it is unsupported and unreliable. See Dkt. #51. Plaintiff's sur-reply identifies five  
5 instances in which McQuarrie's declaration flatly contradicts sworn testimony from his October  
6 30, 2019 deposition. See id.; Dkt. #38; Dkt. #52. Moreover, as plaintiff emphasizes, the  
7 declaration is not particularly relevant to the motion at hand.<sup>4</sup> See Dkt. #39 at 2 n.2. These  
8 issues are further compounded by defendants' untimely filing. For these reasons, despite the  
9 Court's preference for full information, it has not considered McQuarrie's declaration (Dkt. #38)  
10 in ruling on defendants' motion to amend.

### 11 **III. MOTION FOR LEAVE TO AMEND ANSWER**

12 Defendants seek to amend the third affirmative defense in their answer to specifically  
13 apportion fault to non-parties Safeway and Securitas.<sup>5</sup> Courts "should freely give leave [to  
14 amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). There is a "strong policy in favor of  
15 allowing amendment" after considering five factors: (1) prejudice to the opposing party (2)  
16 futility of amendment, (3) undue delay, (4) bad faith, and (5) whether the pleadings have  
17 previously been amended. See Kaplan v. Rose, 49 F.3d 1363, 1370 (9th Cir. 1994); Allen v.  
18 City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990). The underlying purpose of Rule 15 is  
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21 <sup>3</sup> The Court has not considered the section of defendants' reply titled "Response to Facts," which  
22 contains no citations to the record and which, by their own admission, is at least partially "immaterial."  
See Dkt. #37 at 2-3.

23 <sup>4</sup> To the extent the statements in McQuarrie's declaration are relevant, they are supportive of  
24 defendants' original motion, not their reply brief. See Dkt. #38. In failing to submit the declaration  
25 until filing their reply, defendants prevented plaintiffs' from meaningfully responding during the  
briefing process.

26 <sup>5</sup> See Dkt. #25-1 at 6 ("The parties and non-parties identified through discovery were at fault for  
27 the subject incident, *including Safeway, Inc. and Securitas Security Services, Inc. identified in*  
28 *SAFEGWAY 32, though public records research reveals that company is doing business as Securitas*  
*Security Services USA, Inc.* Defendants will ask the jury to apportion fault based on evidence learned  
through discovery. Defendants will ask the Court to offset any award in [p]laintiff's favor by his share  
of fault.") (proposed addition emphasized).

1 “to facilitate decision on the merits, rather than on the pleadings or technicalities.” Lopez v.  
2 Smith, 203 F.3d 1122, 1127 (9th Cir. 2000). Plaintiff and Safeway now argue that defendants’  
3 proposed amendment would be futile and is in bad faith. Plaintiff also contends that the  
4 proposed amendment manifests undue delay and prejudice.<sup>6</sup>

5 **a. Prejudice**

6 “Prejudice, in the context of a motion to amend, means undue difficulty in prosecuting a  
7 lawsuit as a result of a change of tactics or theories on the part of the other party.” Wizards of  
8 the Coast LLC v. Cryptozoic Entm’t, 309 F.R.D. 645, 652 (W.D. Wash. 2015) (internal  
9 quotation marks and citations omitted). Prejudice carries the “greatest weight” among the five  
10 factors. See Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003).  
11 Plaintiff argues that he will be prejudiced by defendants’ amendment because (1) he is 70 years  
12 old and already traveled for his deposition and Rule 35 examination with Safeway absent, since  
13 it had already been dismissed, and (2) it would require additional needless discovery that would  
14 “fail to produce any material evidence to support a legally recognized liability theory.” Dkt. #34  
15 at 12. Defendants counter that there is no prejudice because (1) plaintiff originally sued  
16 Safeway, and (2) plaintiff and Safeway were aware of the September 4, 2019 stipulated case  
17 deadline. See Dkt. #25 at 7; Dkt. #37 at 6-7. The Court agrees with plaintiff that he would  
18 suffer some hardship if defendants were permitted to amend, but also recognizes that the parties  
19 were aware of the September 4, 2019 stipulated deadline to amend pleadings. Accordingly, the  
20 Court concludes that the “prejudice” factor weighs slightly in favor of permitting amendment.

21 **b. Futility of Amendment**

22 “A motion for leave to amend may be denied if it appears to be futile or legally  
23 insufficient.” Hofschneider v. City of Vancouver, 182 F. Supp. 3d 1145, 1150 (W.D. Wash.  
24 2016) (citing Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988)). An amendment  
25 is futile “if no set of facts can be proved under the amendment to the pleadings that would  
26 constitute a valid and sufficient claim or defense.” Miller, 845 F.2d at 214.

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28 <sup>6</sup> The Court notes that defendants have not previously moved for leave to amend. Accordingly,  
the fifth factor does not preclude granting defendants’ motion.

1 Defendants allege that Safeway and/or Securitas may be at fault due to their instruction to  
2 Desta to move his truck. They assert that Safeway's or Securitas' "manner of operating the lot  
3 was a cause of the accident." Dkt. #25 at 7. But plaintiff and Safeway argue that Safeway  
4 and/or Securitas "cannot incur liability simply for telling [Desta] to move his vehicle." See Dkt.  
5 #34 at 10; Dkt. #32 at 7-8. While "a defendant is entitled to shepherd evidence and attempt to  
6 prove that the 'empty chairs' in a lawsuit are the proximate cause of the injuries alleged," fault  
7 cannot be allocated to an entity whose "conduct is not a proximate cause of an injury." Sudre v.  
8 The Port of Seattle, No. C15-0928-JLR, 2016 WL 7035062, at \*15 (W.D. Wash. Dec. 2, 2016)  
9 (citing RCW 4.22.015) (internal quotation marks and citations omitted). Defendants have not  
10 articulated any possible legal basis under which Safeway and/or Securitas breached a duty owed  
11 to plaintiff or were the proximate cause of plaintiff's injury. See, e.g., Nguyen v. City of Seattle,  
12 179 Wn. App. 155, 164 (2014) ("Negligence requires proof of four elements: (1) the existence  
13 of a duty to the person alleging negligence, (2) breach of that duty, (3) resulting injury, and (4)  
14 proximate cause between the breach and the injury."). The Court agrees with plaintiff and  
15 Safeway that defendants' proposed affirmative defense apportioning fault to Safeway and/or  
16 Securitas based on their instructions to Desta would be futile.

17 Defendants also appear to imply—based on a single sentence in their motion—that  
18 Safeway may share fault based on dangers in its lot. See Dkt. #25 at 7 ("[T]he basis for  
19 [p]laintiff's initial claims against Safeway regarding dangers in the lot and insufficient lighting  
20 remain unanswered."). Plaintiff alleged negligence based on premises liability in his original  
21 complaint, but this claim was abandoned in the parties' stipulated dismissal of all claims against  
22 Safeway.<sup>7</sup> See Dkt. #1-2; Dkt. #22. To the extent defendants' seek to apportion fault to  
23 Safeway based on dangerous conditions in the lot, plaintiff and Safeway argue that the defense  
24 would be futile because (1) defendants cannot allocate fault based on dismissed claims, (2)  
25 defendants failed to conduct any discovery regarding lot safety and have adduced no evidence to  
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27 <sup>7</sup> Again, this was grounded in plaintiff's counsel's determination, "after conducting initial  
28 discovery and investigation, including the exchange of interrogatories and requests for production by all  
parties, . . . [that] there was no viable avenue of liability against [d]efendant Safeway." Dkt. #34 at 6.

1 support such a defense, and (3) Desta’s deposition testimony in fact contradicted defendants’  
2 claims of lot danger. See Dkt. #32 at 6; Dkt. #34 at 10-12; see also Dkt. #33 at 6-9 (indicating  
3 that it was not too dark to see in the lot and that there was plenty of space to make a “U-turn”  
4 without entering into the pedestrian area of the lot).

5 The Court finds that defendants’ proposed allocation of fault based on the guard’s  
6 instructions to move the truck would be futile. Their proposed allocation of fault based on  
7 dangers in the lot is not *per se* futile, but the plausibility of this affirmative defense is weakened  
8 by defendants’ failure to establish any evidence whatsoever in support of the allegation.  
9 Accordingly, while defendants’ proposed amendment is not futile as a matter of law, the Court  
10 finds this factor neutral.

11 **c. Undue Delay**

12 “Undue delay is delay that prejudices the nonmoving party or imposes unwarranted  
13 burdens on the [C]ourt.” Wizards of the Coast, 309 F.R.D. at 651 (internal quotation marks and  
14 citation omitted). Defendants contend that they filed this motion on September 3, 2019 because  
15 they only realized the potential basis for Safeway’s or Securitas’ fault at Desta’s August 29,  
16 2019 deposition.<sup>8</sup> See Dkt. #25 at 6; Dkt. #37 at 5. This contention is belied by the record.  
17 Despite their apparent failure to conduct any additional discovery as to the potential fault of  
18 Safeway and/or Securitas from the time of the stipulated dismissal of Safeway (May 23, 2019),  
19 see Koehler Decl., defendants moved for leave to amend their answer on September 3, 2019, the  
20 day before the deadline set forth in the stipulated dismissal. Defendants have yet to identify any  
21 evidence to support their asserted defense apportioning fault to non-parties Safeway and  
22 Securitas.<sup>9</sup>

23 Furthermore, the Court rejects defendants’ implication that plaintiff has “stonewall[ed]”  
24 their “efforts to discover the factual and legal basis for the claims against Safeway.” See Dkt.

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26 <sup>8</sup> Safeway was not given notice and did not attend Desta’s deposition, having been dismissed as a  
27 party. See Dkt. #33 (Reppart Decl.) at ¶ 4.

28 <sup>9</sup> Moreover, unbeknownst to plaintiff, defendants’ own experts conducted inspections of the  
distribution center and parking lot two months before they agreed to dismiss Safeway from the case.  
See Reppart Decl. at ¶¶ 5-7.

1 #25 at 4-5; Dkt. #37 at 4. While defendants point to nothing in the record in support of this  
2 accusation, plaintiff has shown defendants were served with Safeway's responses to plaintiff's  
3 first interrogatories and requests for production on March 26, 2019. See Dkt. #35 (Koehler  
4 Decl.) at ¶ 14; id. (Ex. L). And defendants fail to rebut the sworn declaration from plaintiff's  
5 counsel indicating that (1) after the parties began discussing Safeway's dismissal, defendants  
6 never followed up on their initial interrogatory regarding plaintiff's claims against Safeway, and  
7 (2) during a July 2019 discovery dispute between the parties, defendants raised concerns about  
8 the basis for plaintiff's claims against *Desta* but said nothing about the basis of plaintiff's claims  
9 against Safeway or Securitas. Dkt. #36 (Benedetti Decl.).

10 Defendants have not been diligent. And while delay alone "is an insufficient ground for  
11 denial of leave to amend," United States v. Webb, 655 F.2d 977, 980 (1981), as discussed  
12 below, the Court questions the motives underlying defendants' timing and amendment strategy.  
13 Defendants' undue delay weighs against granting leave to amend.

#### 14 **d. Bad Faith**

15 Plaintiff and Safeway allege that defendants' motion to amend manifests bad faith.  
16 While defendants reject this contention, the Court is troubled by the discussions surrounding  
17 defendants' March 2019 inspection of the Safeway parking lot. See Reppart Decl. at ¶¶ 5-7. As  
18 plaintiff points out, defendants arranged this inspection by conveying to Safeway that they  
19 would "rather not do discovery between [their] companies in front of the plaintiff." See Dkt.  
20 #33 (Ex. 3); Dkt. #34 at 6. And according to Safeway's counsel, defendants assured her that  
21 they did not intend to claim that there were any issues with the parking lot. See Reppart Decl. at  
22 ¶ 6; Dkt. #33 (Ex. 2 & 3). Defendants' concede that they "did not intend at the time to blame  
23 Safeway," but assert that "they still did not know why [p]laintiff sued Safeway in the first  
24 place." Dkt. #37 at 6. This contention is at odds with the fact that negligence and premises  
25 liability are both alleged on the face of plaintiff's complaint. See Dkt. #1-2. Defendants agreed  
26 to dismiss Safeway (see Dkt. #22) and cannot earnestly argue that they waited until September  
27 3, 2019 to assert their proposed amendment due to their lack of understanding of plaintiff's  
28 rationale for suing Safeway. In light of defendants' conduct, apparent failure to engage in

1 meaningful discovery regarding Safeway or Securitas since the stipulated dismissal, and last  
2 minute proposed amendment to assert fault against Safeway and Securitas despite their previous  
3 stipulation, the Court finds defendants' motion for leave to amend manifests bad faith. This  
4 factor weighs against granting leave to amend.

5 **IV. CONCLUSION**

6 For all the foregoing reasons, the Court concludes that the relevant factors weigh against  
7 granting defendants' motion for leave to amend. On balance, the undue delay and bad faith  
8 underlying defendants' motion, combined with the partial futility of the proposed amendment,  
9 lead the Court not to permit the proposed amendment at this stage. Defendants' Motion for  
10 Leave to Amend Answer (Dkt. #25) is therefore DENIED.

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12 DATED this 7<sup>th</sup> day of February, 2020.

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15 Robert S. Lasnik  
16 United States District Judge  
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